be gained by prompt action.[16] Under modern statutes this is changed and judgments are ranked according to the date when they became liens.[17] It seems reasonable to say that the purpose of these modern statutes is to make a creditor secure in his rights the moment his judgment becomes a lien, irrespective of execution, thereby protecting him against all except prior encumbrancers.

THE CONSTITUTIONALITY OF SECTION 11 (K) OF THE FEDERAL RESERVE ACT. — The Supreme Court bids fair to be called upon soon to pass on the validity of the Federal Reserve Act of 1913,[1] now in operation for something over two years.[2] Section 11 (K)[3] by which the Federal Reserve Board is empowered "to grant, by special permit to banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds, under such rules and regulations as the said board may prescribe," has been declared by the Supreme Court of Illinois to be unconstitutional. *People* v. *Brady*, 271 Ill. 100, 110 N. E. 864. And the same issue is now before the Supreme Court of Michigan.[4] The question considered by the court to be of principal importance was whether Congress has constitutional power to erect a banking corporation with the additional powers of a trust company. Unfortunately, the language of the opinion [5] would seem to indicate that the court decided against the statute for want of an affirmative showing of such existing conditions as would justify it. If this means that the court disregarded the presumption in favor of the validity of a statute, the authority of the decision is shaken at the outset; for no proposition is better settled.[6] On the other hand the court quite properly, as it seems, dismissed the contention that the act is bad as involving an unconstitutional delegation of legislative power.[7]

Assuming that it is necessary to decide the present limits of the power of Congress to charter a corporation, some interesting questions are raised. It is clear that there is in the federal government no general incorporat-

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[16] See Rowe *v.* Bant, 1 Dick. (Ch.) 150. And see PRIDEAUX, LAW OF JUDGMENTS, 4 ed., 55.

[17] Rankin *v.* Scott, *supra*, 12 Wheat. 177; Andrews *v.* Wilkes, 7 Miss. 554.

[1] U. S. COMP. STAT. (1913), § 9785, 38 STAT. AT L. 251.

[2] The act was approved Dec. 23, 1913.

[3] U. S. COMP. STAT. (1913), § 9794, 38 STAT. AT L. 262.

[4] Atty.-Gen. *v.* First National Bank (No. 26853, *quo warranto*).

[5] 110 N. E. 864, 868.

[6] See Butterfield *v.* Stranahan, 192 U. S. 470, 492; County of Livingston *v.* Darlington, 101 U. S. 407, 417; Dragovich *v.* Iroquois Iron Co., 269 Ill. 478.

[7] The distinction between legislation and administration, though in theory clear, in practice presents in each case a question of degree. As defined, the line is a plain one, the function of administrative officials being to determine and act upon issues of fact. See Cincinnati, Wilmington, etc. R. Co. *v.* Commissioners, 1 Ohio St. 77, 88; Locke's Appeal, 72 Pa. 491, 498, 499. Yet conclusions as to reasonableness and propriety are now commonly recognized as within their sphere of decision. See Field *v.* Clark, 143 U. S. 649, 693; Chicago, B. & Q. R. *v.* Jones, 149 Ill. 361, 378. So far as the present statute is concerned it seems sufficiently evident that the powers conferred on the Federal Reserve Board are less extensive in this regard than those now exercised by the Interstate Commerce Commission. See Houston and Texas Ry. *v.* U. S., 234 U. S. 342, 355.

ing power.[8] But that Congress may, in the furtherance of its power to establish a uniform currency, incorporate a bank, is too well settled for argument.[9] Moreover, it was long ago agreed that such a bank may properly, for the sake of its general efficiency as an institution, and so as a federal organ, exercise the usual private powers of a bank for private gain, including such as have no direct connection whatever with its federal functions.[10] Accordingly, the national banks have enjoyed a wide activity;[11] and have even with judicial approval in isolated instances acted in a trust relation.[12] Since the justification for such powers is found in the necessity of having the bank exist as an influential and capable institution,[13] the question whether conditions now demand the addition of the powers here in question seems to resolve itself into one of fact; of how far the financial activity of trust companies has encroached upon that of the banks; and of how far, as a result, state banks, with which the federal ones must compete, are now permitted to exercise such powers. On this point, some authoritative statistics are available, indicating the rapid growth of trust companies, as compared with that of the banks.[14] An examination of the recent state statutes, moreover, reveals the significant fact that to-day in practically every state institutions may be incorporated with the combined powers of bank and trust company.[15]

[8] See McCulloch *v.* Maryland, 4 Wheat. 316, 406, 411.

[9] McCulloch *v.* Maryland, 4 Wheat. 316. Farmers', etc. Bank *v.* Dearing, 91 U. S. 29. See Davis *v.* Elmira Savings Bank, 161 U. S. 275, 283.

[10] See Osborn *v.* Bank of United States, 9 Wheat. 738, 860, 861, 862, 864.

[11] For example, a national bank may borrow money (see Aldrich *v.* Chemical National Bank, 176 U. S. 618, 627); become pledgee of stock (National Bank *v.* Case, 99 U. S. 628); improve property owned (Cockrill *v.* Abeles, 86 Fed. 505); make collections for others (Exch. Nat. Bank *v.* Third Nat. Bank, 112 U. S. 276); guarantee commercial paper (Thomas *v.* City Nat. Bank, 40 Neb. 501); take a mortgage of chattels as additional security for a preëxisting debt (Gaar Scott & Co. *v.* First Nat. Bank, 20 Ill. App. 611).

[12] National Bank *v.* Graham, 100 U. S. 699; American Can Co. *v.* Williams, 178 Fed. 420; Boone County Nat. Bank *v.* Latimer, 67 Fed. 27.

[13] In Osborn *v.* Bank of United States, 9 Wheat. 738, 861, 862, the court said, "It [the bank] is an instrument which is 'necessary and proper' for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money, which is conferred by its charter? . . . Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute." These principles apply equally to the present system of national banks. See Easton *v.* Iowa, 188 U. S. 220, 229.

[14] The report of the Comptroller of the Currency for 1915 shows that during the period from 1875 to 1915 the total deposits in trust companies throughout the United States increased from $85,025,371 to $4,216,017,244, or about fifty times. During the same time the total deposits in national banks increased from $696,652,020 to $6,611,218,000, or about nine and one half times. These figures show that during this time trust company deposits have risen from 12 to 66 per cent of the total of the bank deposits.

[15] In many states the statutes expressly so provide. See, for instances, CONN. LAWS, 1913, ch. 194, § 8; IND. LAWS, 1915, ch. 97; OHIO ANN. CODE, § 9723; ORE. LAWS, 1911, ch. 354, § 4. Similar provisions in fifteen or twenty other states might be cited.

In other states substantially the same situation obtains through a liberal enunciation of the powers of trust companies. See, for instances, KAN. LAWS, 1907, ch. 425, § 2; MASS. REV. LAWS, 1902, ch. 116, §§ 12–14; N. J. LAWS, 1899, ch. 134, § 6, 4 COMP. STAT., p. 5656; N. Y. BANK. LAW, 1914, § 185, 9 CONSOL. LAWS, p. 146.

Other statutes, though somewhat more narrowly restricting the powers of the trust

Accepting *McCulloch* v. *Maryland* as a premise, it would seem that if the constitution is to keep pace with the changing times, a thoughtful study of considerations such as these is imperative. They indicate a commercial situation which should have a direct practical bearing on an interpretation of the powers of Congress in this connection. Yet it is questionable whether it should be necessary as the act stands for a court to consider these and similar factors. No doubt they would be vital were the federal government attempting to create corporations with these powers in defiance of state law. The clause, "when not in contravention of state or local law," however, seems to render it possible for a state at any time to deny by an appropriate statute the power of the bank so to proceed.[16]

If this is so — and it is difficult to read the clause in any other way — the meaning of section 11 (K) comes merely to this: that the sovereign power which erected the corporation and which could therefore destroy it for the unauthorized assumption of trust company power, hereby formally waives its right to do so. To paraphrase it, the federal government in effect agrees that if the bank chooses to exert this power, and the state, which could object, does not do so, the federal government, which could also object, will not do so either. In this there is no pretense that Congress can authorize such power. That such authority inheres in the states is, indeed, expressly affirmed by the words of the section; and if (as we must suppose) the latter is to have a meaning, it follows that the utmost that it attempts is to operate upon the federal government's undoubted power of attack by *quo warranto*. It is clear that the sovereign may by legislation waive this right;[17] and that the words of the section are sufficient to effect a waiver seems evident. On this view, which, it is submitted, represents the preferable interpretation of the section, the question of extending the doctrine of *McCulloch* v. *Maryland* is not raised, and the statute may be sustained without adverting to the constitutional difficulties discussed by the state court.

A NEW VARIETY OF UNDUE DISCRIMINATION UNDER THE INTERSTATE COMMERCE ACT.— Once it has properly taken jurisdiction, a rate fixed by the Interstate Commerce Commission will not be disturbed by a reviewing court unless it plainly falls outside a wide range of administrative discretion.[1] Before the Commission can assume jurisdiction, however, it must find a clear violation of law. It is not enough that the

companies, exhibit the same tendency. See COLO. REV. STAT., 1912, § 305; MINN. GEN. STAT., 1913, §§ 6409, 6416, 6417; N. H. LAWS, 1915, ch. 109, §§ 14 and 34; KIRBY'S DIG. (Ark.), 1904, § 888.

In a few states no such provisions seem to exist, namely, Delaware, Maryland, Michigan, Nebraska, Pennsylvania, and Wisconsin. In two of these unauthorized assumption of banking powers is expressly made illegal. Michigan, 5 HOWELL'S STAT., §§ 14861–69; Nebraska, GEN. L., 1909, § 3710.

[16] Thus, New Hampshire has a statute prohibiting any corporation, national or state, from acting as administrator or executor. N. H. LAWS (1915), ch. 109, § 34.

[17] People *v.* Ulster & D. R. Co., 128 N. Y. 240, 28 N. E. 635; People *v.* Los Angeles Electric Ry. Co., 91 Cal. 338, 27 Pac. 673.

[1] Illinois Central R. Co. *v.* Interstate Commerce Commission, 206 U. S. 441.